

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
DIVISION OF JUDGES  
NEW YORK BRANCH OFFICE

ROSE FENCE, INC.,

and

Case No. 29-CA-030485  
29-CA-030537

INTERNATIONAL BROTHERHOOD OF  
TEAMSTERS

Lynda Tooker, Esq.  
for the General Counsel

Stanley Israel, Esq.  
for the Respondent

Jae W. Chun, Esq.  
Friedman & Anspach  
(New York, New York)  
for the Charging Party

DECISION

Statement of the Case

Mindy E. Landow, Administrative Law Judge. This supplemental proceeding was tried before me in Brooklyn, New York on March 15 and April 20, 2016, pursuant to a compliance specification and notice of hearing that issued on December 29, 2015 as amended on March 15, and again on March 30, 2016.

Background

This supplemental proceeding stems from layoff of employees in 2010, which was found by the Board to be a violation of Section 8(a)(5) and (1) of the Act. As the General Counsel has readily acknowledged and the facts show, Respondent operates a largely seasonal business. Operations typically begin in March of any given year and continue until about August or September. As was adduced in the underlying record, prior and subsequent to the Union's certification, Respondent would lay off the majority of its employees at that time, retaining only a skeleton crew.

On December 16, 2014,<sup>1</sup> the National Labor Relations Board issued its Decision and Order, reported at 361 NLRB No. 134, directing the Respondent to cease and desist from unilaterally laying off employees in a newly-certified bargaining unit represented by the Charging Party (Union) without providing the Union with timely notice and an opportunity to bargain about the decision to

---

<sup>1</sup> Due to the decision of the United States Supreme Court in *NLRB v. Noel Canning*, 134 S. Ct. 2550 (2014), the initial decision in this matter, issued on December 22, 2012, which had been enforced by the Court of Appeals for the Second Circuit, was vacated upon motion of the Board and remanded for further proceedings.

lay off employees and the effects of the layoff. Among the remedial provisions ordered by the Board was the requirement that Respondent offer the unit employees full reinstatement to their former jobs, and if those jobs no longer exist, to substantially equivalent jobs, without prejudice to their seniority or any other rights or privileges previously enjoyed, to make whole unit employees for any loss of earnings such employees may have suffered by reason of the Respondent's unilateral layoff of employees and compensate the unit employees for the adverse consequences, if any, of receiving lump-sum backpay awards.

On March 12, 2015, the United States Court of Appeals for the Second Circuit entered a judgment enforcing the Board's Order in full.

On December 29, 2015, the Regional Director for Region 29 issued a Compliance Specification and Notice of Hearing (the compliance specification). On January 19, 2016, the Respondent filed an answer to the compliance specification, admitting in part and denying in part the allegations set forth therein. The answer alleged that any employee laid off during the winter months of 2010 was instructed to call the main office of the Employer by the end of February [2011] for a return to work date and that laid off employees were hired back during the succeeding months of March and April unless terminated for cause; that the compliance specification was issued prior to Respondent's ability to provide the Region with records regarding its attempts to contact employees to offer them reinstatement; that the actions of the Region were undertaken in bad faith; and that certain portions of the backpay period were constitutionally infirm. Respondent also lodged a general denial of the backpay computations, raising specific defenses as to 19 employees alleging abandonment of work. The answer further set forth a work authorization defense, which was later withdrawn. On March 10, 2016, the General Counsel filed a Motion for Partial Summary Judgment, (the motion), as discussed below.

At the opening of the hearing, I granted, in part, Counsel for the General Counsel's motion based upon Respondent's failure to answer the compliance specification in accordance with the requirements of Section 102.56 (b) and (c) of the Board's Rules and Regulations<sup>2</sup> and extant case law. See e.g. *Flaum Appetizing Corp.*, 357 NLRB No. 162 (2011), citing *Mining Specialist, Inc.*, 330 NLRB 99 101 (1999). In particular, I granted summary judgment with regard to Paragraph I ("the Discriminatees")<sup>3</sup> and Paragraph II ("The Backpay Period")<sup>4</sup>. I denied General Counsel's motion with regard to Paragraph III ("Computation of Backpay") because I found it to be ambiguous and because, in its answer, Respondent had raised issues of mitigation which I found to be appropriate to explore through record testimony. On March 30, 2016, Counsel for the General Counsel filed an additional Motion to Amend the Compliance Specification limited specifically to enumerating and

---

<sup>2</sup> Section 102.56(b) requires a respondent to "specifically admit, deny or explain each and every allegation of the specification, unless the respondent is without knowledge, in which case the respondent shall so state, such statement operating as a denial...." Section 102.56 (c) provides that if a respondent files an answer to the specification but does not deny any allegation in the manner required by the Rules and is not explained, "such allegation shall be deemed to be admitted to be true, and may be so found by the Board without the taking of evidence supporting such allegation and the respondent shall be precluded from introducing any evidence controverting the allegation."

<sup>3</sup> The alleged discriminatees are "all full-time, regular part-time and seasonal drivers, installers, driver-installers, helpers, installer-helpers, yard workers and carpenters employed by Respondent at its facility located at 939 Church Street, Baldwin New York, who were laid off between July and August [2010]. There are 25 such employees listed in the compliance specification.

<sup>4</sup> The backpay period is alleged to begin on July 7, 2010, the date on which Respondent first laid off a unit employee and runs until each employee receives a valid offer of reinstatement to his former, or a substantially equivalent position.

explaining the Board's method for computation of the adverse tax consequences of receiving a lump-sum backpay award. In sum, the General Counsel seeks a backpay award to 25 claimants totaling \$1,322,884.00 with interest accrued to the date of such payment, minus the tax withholdings required by law. The General Counsel further seeks an order requiring reimbursement of amounts equal to the difference owing upon receipt of a lump sum payment of taxes that would have been owed had there been no lay off. General Counsel further seeks that Respondent be required to submit appropriate documentation so that backpay will be allocated to the appropriate periods by the Social Security Administration.

## 10 The Region's Compliance Investigation

The Region's Compliance Officer commenced her investigation of backpay due to employees in October 2012. She requested payroll records for the year 2010 which showed that many employees had commenced working in April 2010, while others had been employed in January or February of that year. Respondent also furnished a list of employees showing the last pay period they worked in 2010, their job titles and wage rates for the 2010 season, whether they returned to work in 2011 and other information such as address, phone number and social security number where available.

This investigation was placed on hiatus due to the *Noel Canning* decision, noted above. Once the Board reaffirmed its earlier decision in December 2014, the compliance investigation resumed. Pursuant to the Region's request, Respondent provided payroll records from 2009 through the spring of 2015.

The investigation, as conducted by the Region, led to a determination that of the 45 employees which were the subject of the initial litigation, 25 were potentially owed backpay. The other 20 employees were deemed ineligible for a number of reasons including that they had not been employed in 2010, had not been laid off after the 2010 summer season or were discharged for cause and therefore had not been subject to the unlawful layoff.

The Region's Compliance Officer testified that the calculation of backpay required the resolution of various difficulties including the seasonal nature of Respondent's business and the limited nature of the records Respondent was able to supply for the employees in question. In order to fashion a backpay formula which would take these exigencies into account, the Compliance Officer determined that there should be two groups of employees with different formulas applied to each.

### Backpay Formula 1

This group comprises a total of 8 employees. These particular employees were laid off in 2010 and then resumed their employment with Respondent in March or April 2011, and worked thereafter. Thus, there were payroll records reflecting the hours they worked for the Employer in the years after the unfair labor practice. The Compliance Officer testified that she used each employee's payroll records after 2010 to determine the average hours worked in each month of the year. She then calculated weekly backpay by multiplying the average hours worked in a week for the appropriate month by the employee's wage rate at the time of the layoff.

As the Compliance Officer testified, the backpay formula for these employees are based upon their actual earnings in years after the unfair labor practice and reflect the seasonal nature of Respondent's operations because the calculations are based upon monthly averages of hours that the employees in question actually worked in the same month in subsequent years.

## Backpay Formula 2

This formula was applied to those employees who were not reinstated by Respondent in 2011. Thus, there is a limited universe of payroll records for such employees which generally extended from April to August 2010. The Compliance Officer used the 2010 payroll records to estimate what employees would have earned in comparable months in subsequent years, i.e. the May 2010 records were used to estimate what an employee might have earned in May 2011, 2012, 2013 and so forth.

The records of employee members of this group did not reflect earnings in the months of January, February, March, September, October, November and December of 2010. The Compliance Officer testified that she relied upon the payroll records of similarly situated employees to estimate backpay for these months. In this regard, the Compliance Officer relied upon the records of 5 employees who had not been laid off in 2010 and had continued to work for Respondent thereafter, determining the average number of monthly hours such employees had worked for Respondent in each month of subsequent years, taking into account those weeks where the comparator employees were not employed. In this fashion, the Compliance Officer determined the appropriate number of hours to credit each employee on a weekly basis and multiplied that number by the wage rate of each employee at the time of the layoff.

## Interim Earnings

The Compliance Officer testified as to her attempts to contact the employees subject to the Board's order. She called the phone numbers and mailed questionnaires to the addresses provided by the Employer. She used software applications to update the contact information. In the event she was successful in contacting employees and they reported interim earnings, she deducted such earnings as reflected in the compliance specification, as amended. The Compliance Officer further testified that in the event she was able to contact an employee in 2012, but not thereafter, she extrapolated the amount of their interim earnings throughout the backpay period.<sup>5</sup>

The Compliance Officer further testified that she was unable to contact a number of employees. The General Counsel submitted a list of such employees.<sup>6</sup>

It should be noted that General Counsel had none of the employees subject to the unfair labor practices in this proceeding testify, or otherwise indicated that they were available to do so. There is also no evidence that any of the named claimants applied for or received unemployment compensation benefits based upon their employment with Respondent during the backpay period.

## Respondent's Proffered Evidence Regarding Availability of Work

Respondent's manager Brian Cinque testified that Respondent's general practice was to lay off employees beginning in August of any particular year and return them to work in about March of

<sup>5</sup> Interim earnings were deducted in this manner for the following employees: Balbino Canas, Antonia Flores, Nelson Flores, Melvin Rubin Joya, Victor Parada and Byron Mejia Sanchez.

<sup>6</sup> These are: Pablo Alferez, Jose Andrade, Efrain Avila, Juan DeLa Rosa Batista, Marlon Valle Benitez, Franklin Cabrera, Carlos DaSilva, Jose Torres Gomez, Franklin Hernandez, Juan Maldonado, Jose S. Martinez and David Rodriguez. Three additional employees are listed: Neftali Ortiz, Edwin Romero and Encarnacion Torres. According to the General Counsel, these employees have since returned to work for the Respondent and may not actually be missing, but have rather declined to respond to the Region's attempts to contact them.

the following year when business resumed. He further testified regarding conversations he recalled with specific employees. Generally, he testified to a very similar type of conversation held with various employees which took place at Respondent's facility at Church Street in Baldwin, New York. As Cinque recounted, he would speak with the employees individually, apologize for the  
 5 layoff, explain there was not sufficient work, that work would pick up in the spring and that employees should call the Employer in March.<sup>7</sup> Although Cinque could not specifically recall certain of these discussions, he testified that this had been common practice throughout the years.

Cinque further testified that he had substantially similar conversations with employees  
 10 Nelson Flores, Julio Diaz Mendoza, Neftali Ortiz and Juan Plietez, all of whom returned to work for the Employer in the spring of 2011. He also spoke with Antonio Flores, who returned to work for the Employer in 2012; and further spoke with Victor Parada who eventually did return to work, but Cinque could not recall when.

Cinque additionally testified that he had a similar conversation regarding the layoff of employee Edwin Alvila. As he had no telephone contact number for Alvila, he asked other employees if they knew how to reach him but no one was able to provide him with contact information. With regard to Juan DeLa Rosa Batista, Cinque testified that he told him he could make more money if he had his own installation truck, rather than working as a helper, and DeLa  
 20 Rosa agreed. He did not return to work in the spring of 2011. Respondent did not have a telephone number for him and did not contact him. At the time Cinque laid off employee Balbino Canas he told him that he had done well with his truck during his first season at work. Canas provided Cinque with a telephone number. Cinque testified that when it was time to recall employees he called Canas on a couple of occasions, but that no one had answered the phone. He did not return to  
 25 work for Respondent. Cinque testified that he called employee Melvin Rubin Joya for recall but there was no answer.

Cinque testified that he spoke with employee Juan Maldonado about his layoff, apologizing that there was no work and that the layoff was temporary, that they would like to have him back in  
 30 the spring and to call. Cinque testified that Maldonado did not call or seek to return to work in the spring of 2011 and that Respondent did not have a telephone contact number for him.

With regard to Byron Mejia Sanchez, Cinque testified that he told this employee that he did not have enough work to send Sanchez's truck out and there would be work for him in the spring.  
 35 This employee became angry that he was being laid off when others were not. Mejia Sanchez did not call for work in the spring.

Cinque testified that he talked to employee Pedro Zelaya about the layoff. He apologized that Respondent did not have enough work for him to do to send out his truck and said that there  
 40 would be a job for him in the spring. Zelaya returned to work for Respondent in Spring 2011.

According to Respondent, employee Edwin Romero still works for the Employer and returns every year. Records provided by Respondent show that Encarnacion Torres had a break in service beginning in 2010, but returned to work in 2014. Cinque failed to offer evidence as to what  
 45 discussions, if any, he had with these employees at the time of their layoffs in 2010.

Cinque could not recall specific discussions with employees Pablo Alvarez, Jose Andrade and Jose S. Martinez.

---

50 <sup>7</sup> Cinque specifically named the following employees: Marlon Valle Benitez, Franklin Cabrera, Carlos DaSilva, Franklin Hernandez, Jose Torres Gomez, David Rodriguez and Santos Romero.

Under questioning from the General Counsel, Cinque acknowledged that Respondent keeps employee contact information in its personnel files. Cinque further testified that none of the employees named provided a telephone number where they could be reached<sup>8</sup> and further  
 5 acknowledged that Respondent did not initiate contact with them to offer reinstatement after their layoff. General Counsel points out that Respondent had addresses for all employees and never mailed an offer of reinstatement to any of them.

#### Contentions of the Parties

10 Counsel for the General Counsel argues that the facts established at the hearing show that Respondent has not yet made valid offers of reinstatement to certain employees.<sup>9</sup> Thus, Respondent has not complied with the Board's Order to reinstate such employees as set forth in its decision and their backpay continues to accrue until a valid offer of reinstatement is made.  
 15 In support of these contentions, General Counsel relies upon *International Measurement & Control Company*, 277 NLRB 962, 964 (1985). There, the Board found that an offer of reinstatement to an employee must be specific, unequivocal, and unconditional to toll backpay. See also *Tony Roma's Restaurant*, 325 NLRB 851 (1998). It is the employer's burden to show that it made a valid offer of reinstatement to discriminatees. *L.A. Water Treatment*, 263 NLRB 244, 246-247 (1982).

20 As counsel for the General Counsel notes, notification of the availability of reinstatement is an integral part of an employer's obligation. As a general proposition, if an employer in good faith mails an offer of reinstatement to an employee who had been discriminatorily discharged, addressed to the employee's last known address, the Board will toll backpay from the date of the  
 25 attempt to deliver such an offer. *Knickerbocker Plastic Co.*, 132 NLRB 1209, 1236 (1961). Counsel for the General Counsel further contends that the testimony of manager Cinque relating to employee layoffs in 2010, fails to meet the Board's requirements for an offer of reinstatement that would cut off the backpay period. As such, Cinque testified that he told many of the employees that work would pick up again in the spring and they should contact Respondent in March 2011; he told  
 30 others that the layoff was temporary and that Respondent would like to have them back in the spring and they should please give Respondent a call. As General Counsel argues, such communications fail to constitute a specific or unequivocal offer of reinstatement and are further problematic as they occurred contemporaneously with the unfair labor practice at issue herein and required employees to wait many months before being considered for reinstatement. This latter  
 35 argument, of course, fails to consider the acknowledged seasonal nature of the Employer's business operations. It is also the case that in the underlying case General Counsel has failed plead or otherwise adduce evidence that the layoffs, while found to be violative of the Act, were discriminatory as to the employees in question with regard to their vote for union representation.

40 Respondent has argued that all employees laid off in 2010, unless discharged for cause, were instructed to contact Respondent's main office by February of the following year for a return to work date. Thereafter, on or about October 30, 2015, the Region's compliance officer requested that Respondent submit an affidavit attesting to all such calls made to employees unlawfully laid off  
 45 in 2010. Before Respondent could complete such a task, the instant compliance specification issued.

---

<sup>8</sup> Records adduced by the General Counsel show that Respondent did, in fact, have telephone numbers as of 2010 for Franklin Hernandez and Jose Torres Gomez.

50 <sup>9</sup> Those employees who, it is contended, had not received a valid offer of reinstatement as of the date of the hearing are listed in Appendix A of the compliance specification (GC Ex. 1(G)).

Respondent further argues that the law does not require reinstatement during a so-called "dead" season of a seasonal industry. In support of such contentions, Respondent relies upon *NLRB v. Nelson Mfg. Co.*, 120 F.2d, 444 (8<sup>th</sup> Cir. 1941); *NLRB v. Planters Mfg. Co.*, 106 F.2d 524 (4<sup>th</sup> Cir. 1939) and *Trident Seafoods Corp.*, 244 NLRB 566 (1979). However, Respondent has failed to directly address the issue of what formulae would be appropriate in establishing the proper measure of back pay.

Respondent further argues that the actions of the Compliance Officer in this proceeding, insofar as they purport to follow the Board's Compliance Manual were in error, as such publications merely provide guidance and were not binding on the Region given the nature of the instant proceedings.

Respondent additionally notes that none of the 25 named discriminatees appeared at the hearing. Respondent argues that any non-appearing discriminatees as to whom Respondent offered testimony are therefore bound by such testimony. Respondent argues that Cinque's testimony establishes that Respondent thereby met its obligation to offer reinstatement to such employees so as to toll its backpay obligation. Respondent further argues that the evidence shows that for the most part, any offer of reinstatement had been declined and the jobs had been abandoned.<sup>10</sup>

### Analysis and Conclusions

It is well-established that the finding of an unfair labor practice is presumptive proof that some backpay is owed. *The Lorge School*, 355 NLRB 558, 560 (2010). The General Counsel's initial burden in a backpay proceeding is limited to showing the gross backpay due to each discriminatee. The General Counsel has discretion in selecting a formula that will closely approximate backpay and may use any formula that approximates what the discriminatee would have earned had he or she not been discriminated against, as long as the formula is not unreasonable or arbitrary under the circumstances. *Id.* at 560.

Once the General Counsel meets its burden of showing the gross backpay owed, the burden shifts to the respondent to establish facts that negate or mitigate its liability. *St. George Warehouse*, 351 NLRB 961, 963 (2007); *Parts Depot, Inc.* 348 NLRB 152, 153 (2006), *enfd.* 260 Fed. Appx. 607 (4<sup>th</sup> Cir. 2008). Any uncertainty about how much backpay should be awarded to a discriminatee should be resolved in the discriminatee's favor, and against the respondent whose violation caused the uncertainty. *The Lorge School*, 355 NLRB at 360.

### Gross Backpay Calculation

As noted above, I resolved certain of the issues related to the identification of the alleged discriminatees and the alleged backpay period when I decided to grant, in part, General Counsel's motion for summary judgment based upon Respondent's failure to file an answer in comportment with the clear requirements of the Board's Rules and Regulations. I denied other parts of the motion, however, because I found that the compliance specification was ambiguous and needed to

---

<sup>10</sup> Respondent further argues that under *NLRB v. Noel Canning*, 134 S.Ct 2550 (2014), the unconstitutionality of the Boards' composition acts as a tolling mechanism for establishing or calculating backpay prior to the Board's December 16, 2014, Decision and Order. While there obviously has been considerable delay in these proceedings, such delay in issuing a backpay specification does not warrant a reduction in a properly constituted backpay award. See e.g. *NLRB v. J.H. Rutter-Rex Mfg. Co.*, 396 U.S. 258 (1969).

be supplemented by testimony, and because Respondent's answer raised issues of mitigation which needed to be explored on the record.

Notwithstanding an employer's obligation to offer reinstatement to an unlawfully discharged employee, Board and court law has long been clear that to be entitled to backpay, a claimant must mitigate damages by using reasonable diligence in seeking alternative employment. "Longstanding remedial principles establish that backpay is not available to a discriminatee who has failed to seek interim employment and thus incurred a willful loss of earnings." *St. George Warehouse*, 351 NLRB 961, 963 (2007). Thus, "[a] discriminatee must make reasonable efforts during the backpay period to seek and hold interim employment. This is known as the discriminatee's obligation to mitigate. A discriminatee is not due backpay for any period within the backpay period during which it is determined that he or she failed to make a reasonable effort to mitigate[.]" *Id.* (quoting NLRB Casehandling Manual, Part Three Compliance Sec. 10558.1).<sup>11</sup>

To assert, as a defense to backpay liability, that a discriminatee conducted an inadequate job search and thus willfully failed to mitigate, a respondent has the initial burden of presenting evidence showing that there were suitable and substantially equivalent jobs available in the relevant geographic area for an individual with the discriminatee's qualifications. *St. George Warehouse*, 351 NLRB at 963-964. The burden then shifts to the General Counsel to present evidence concerning the discriminatee's job search. Once the General Counsel satisfies that burden of production, the respondent has the ultimate burden of proving that the discriminatee did not mitigate damages by using reasonable diligence in seeking alternate employment. *Id.* at 964.

The alternative employment must be "substantially equivalent to the position from which [the discriminatee] was discharged and suitable to a person of [their] background and experience. *Southern Silk Mills*, 116 NLRB 769, 773 (1956). In determining the reasonableness of any individual's efforts, factors such as age, skills, qualifications and labor conditions in the area are appropriate for consideration. *Alaska Pulp Corp.*, 326 NLRB 522 (1998). Thus, the test for mitigation is not measured by a discriminatee's success in gaining employment but rather by the efforts made to seek work. *The Lorge School*, *supra*.

In this regard, the Board has established a presumptive rule allowing a discriminatee a 2-week period to begin his or her search for work following a discharge and, if a search for work begins within that time frame, backpay will run from the date of the discharge. *Grosvenor Resorts*, 350 NLRB 1197, 1199 (2007). However, as will be discussed below, this general presumption is subject to rebuttal.

Here, the evidence shows that, consistent with the seasonal nature of its operations, Respondent had work available for its workforce, utilizing their qualifications and skills in the relevant geographic area commencing at some point beginning in the Spring of 2011, and that its employees had been notified that such work was available. The evidence additionally shows that those employees who sought such work were rehired. Once Respondent has come forward with evidence (which here was un rebutted) regarding the existence of work for the previously laid off employees, as noted above, the burden shifts to the General Counsel to present evidence

---

<sup>11</sup> I note that no party has requested for me to find that *St. George Warehouse* is inapplicable in this instance. Rather, neither party has relied upon it or addressed it in post-hearing briefs. In any event, it is extant Board law, and I am bound to apply it. Moreover, it appears that the long-standing operating principles of *NLRB v. Mastro Plastics Corp.*, 354 F.2d 170, 175 (2d Cir. 1965), holding that to be entitled to backpay the claimant must mitigate damages by using "reasonable diligence in seeking alternative employment" are equally applicable here.



concerning the claimants' attempts to mitigate any alleged backpay liability; in particular by showing a search for work. This it has failed to do.<sup>12</sup>

As noted above, under current Board law as set forth in *Grosvenor Resort*, supra, a period of 2 weeks is set as a presumptively reasonable amount of time for a discriminatee to begin searching for work. Any period of time longer than that must be justified by "unusual circumstances."

Here, I find that the seasonal nature of the employment engaged in by the employees in question is sufficient for me to conclude that such "unusual circumstances" exist so as to warrant a departure from the 2-week presumption set forth in *Grosvenor Resort*. In this regard, as discussed above, I note that the claimants are, under Board law, to be afforded the benefit of the doubt on this issue. Notwithstanding the foregoing, I find that the record is insufficient for me to conclude that the backpay calculations as set forth by the General Counsel are either appropriate or warranted in this instance.

Rather, I find that the backpay period is appropriately terminated when work became available for the laid off employees. Based upon the records as set forth in the compliance specification, and the testimony of the witnesses, I conclude that this was at the end of March 2011. By then, Respondent had resumed its operations and work was available for laid off employees of the same type, in accordance with their qualifications and skills and in the same geographical location, should they have sought such employment. I credit Cinque's testimony that employees were aware of this option, either through past practice, his direct communication with employees or a combination of both. Accordingly, I find it consistent with extant Board law to terminate the Respondent's ongoing backpay obligation at a time when: it has established that work was available for the laid off employees; it has shown that employees were aware of the option to seek return to work; and there is a lack of evidence of attempts at mitigation by a majority of the employees in question. Based upon the compliance specification I conclude that the relevant date is March 26, 2011.

Accordingly, I find that the employees named in the compliance specification are due backpay based upon the calculations set forth below: Based upon the findings and analysis set forth above, and on the entire record I issue the following recommended supplemental

### ORDER

Respondent, Rose Fence, Inc., Baldwin, New York, its officers, agents successors and assigns shall make whole the claimants listed below by paying them the backpay figures set forth therein, plus interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2014), accrued to the date of payment and minus tax withholding required by Federal and state law. In accordance with *Don Chavas LLC, d/b/a/ Tortillas Don Chavas*, 361 No. 10 (2014), Respondent shall compensate the employees listed below for the adverse tax consequences, if any, of receiving lump sum backpay awards. Pursuant to *Advoserv of New Jersey, Inc.*, Respondent shall assume responsibility for the transmission of the report of the allocation of backpay for each employee to the appropriate

<sup>12</sup> I note that the instant proceedings do not involve questions of whether Respondent has properly complied with the Order of the Second Circuit enforcing the Board's Order as to whether reinstatement was properly offered to the employees. The only issue before me is the measure of backpay the claimants are owed.

calendar quarters to the Regional Director who will then assume responsibility for the transmission of the report to the Social Security Administration at the appropriate time and in the appropriate manner. With regard to the claimants who the General Counsel has been unable to locate, it is further ordered that their specified backpay amounts be held in escrow by the Regional Director, Region 29 for a period not to exceed one year. Should the Regional Director determine that deductions are warranted, the amount so deducted shall be returned to Respondent and the remainder paid to the claimants. In the event that the General Counsel, at the end of the 1-year period has failed to locate any of the named claimants, their awards shall lapse and the full backpay amount shall be returned to the Respondent.

10

		Gross Backpay	Net backpay
15	Pablo Alferez 8/14 through 9/25 (2010 quarter 3) 10/2 through 12/25 (2010 quarter 4) 1/1 through 3/26 (2011 quarter 1) <b>Total backpay</b>	\$ 2,134 \$ 3,434 \$ 1,675 \$ 7,243	
20	Jose Andrade 9/4 through 9/25 (2010 quarter 3) 10/2 through 12/25 (2010 quarter 4) 11/1 through 3/26 (2011 quarter 1) <b>Total backpay</b>	\$ 1,470 \$ 4,242 \$ 1,205 \$ 6,917	
25	Efrain Avila 9/4 through 9/25 (2010 quarter 3) 10/2 through 12/25 (2010 quarter 4) 1/1 through 3/26 (2011 quarter 1) <b>Total backpay</b>	\$ 1,400 \$ 4,040 \$ 1,970 \$ 7,410	
30	Juan DeLa Rosa Batista 8/7 through 9/25 (2010 quarter 3) 10/2 through 12/25 (2010 quarter 4) 1/1 through 3/26 (2011 quarter 1) <b>Total backpay</b>	\$ 3,300 \$ 4,040 \$ 1,970 \$ 9,310	
35	Marlon Valle Benitez 8/21 through 9/25 (2010 quarter 3) 10/2 through 12/25 (2010 quarter 4) 1/1 through 3/26 (2011 quarter 1) <b>Total backpay</b>	\$ 1,605 \$ 4,040 \$ 1,970 \$ 7,615	
40	Franklin Cabrera 8/28 through 9/25 (2010 quarter 3) 10/2 through 12/25 (2010 quarter 4) 1/1 through 3/26 (2011 quarter 1) <b>Total backpay</b>	\$ 1,500 \$ 3,232 \$ 1,576 \$ 6,308	
45	Balbino Canas 8/21 through 9/25 (2010 quarter 3) 10/2 through 12/25 (2010 quarter 4) 1/1 through 3/26 (2011 quarter 1) <b>Total backpay</b>	\$ 1,440 \$ 4,040 \$ 3,120 \$ 4,355	\$ 315 \$ 920
50	Carlos DaSilva 9/4 through 9/25 (2010 quarter 3) 10/2 through 12/25 (2010 quarter 3) 1/1 through 3/26 (2011 quarter 1) <b>Total backpay</b>	\$ 1,400 \$ 4,040 \$ 1,970 \$ 7,410	

	Antonio Flores		
	8/7 through 9/25 (2010 quarter 3)	\$ 2,581	\$ 661
	10/2 through 12/25 (2010 quarter 4)	\$ 3,783	
	1/1 through 3/26 (2011 quarter 1)	\$ 2,511	
5	<b>Total backpay</b>	\$ 6,955	
	Nelson Flores		
	8/21 through 9/25 (2010 quarter 3)	\$ 3,450	\$ 2,645
	10/2 through 12/25 (2010 quarter 4)	\$ 6,653	\$ 5,503
	1/1 through 3/26 (2011 quarter 1)	\$ 5,347	\$ 4,772
10	<b>Total backpay</b>	\$ 12,920	
	Jose Torres Gomez		
	9/4 through 9/25 (2010 quarter 3)	\$ 1,400	
	10/2 through 12/25 (2010 quarter 2)	\$ 4,040	
	1/1 through 3/26 (2011 quarter 1)	\$ 1,970	
15	<b>Total backpay</b>	\$ 7,410	
	Franklin Hernandez		
	8/21 through 9/25 (2010 quarter 3)	\$ 1,760	
	10/2 through 12/25 (2010 quarter 4)	\$ 3,232	
	1/1 through 3/26 (2011 quarter 1)	\$ 1,576	
20	<b>Total backpay</b>	\$ 6,565	
	Melvin Rubin Joya		
	8/7 through 9/25 (2010 quarter 3)	\$ 3,000	\$ 720
	10/2 through 12/25 (2010 quarter 4)	\$ 4,040	\$ 335
	1/1 through 3/36 (1011 quarter 1)	\$ 1,970	\$ 0
25	<b>Total backpay</b>	\$ 1,055	
	Juan Maldinado		
	7/17 through 9/25 (2010 quarter 3)	\$ 3,663	
	10/2 through 10/25 (2010 quarter 4)	\$ 3,232	
	1/1 through 3/26 (2011 quarter 1)	\$ 1,576	
30	<b>Total backpay</b>	\$ 9,526	
	Jose S. Martinez		
	9/4 through 9/25 (2010 quarter 3)	\$ 1,820	
	10/2 through 12/25 (2010 quarter 4)	\$ 5,252	
	1/1 through 3/26 (2011 quarter 1)	\$ 4,100	
35	<b>Total Backpay</b>	\$ 11,172	
	Julio Diaz Mendoza		
	9/4 through 9/25 (2010 quarter 3)	\$ 1,405	
	10/2 through 12/25 (1010 quarter 4)	\$ 4,501	
	1/1 through 3/26 (2011 quarter 1)	\$ 3,585	
40	<b>Total backpay</b>	\$ 9,491	
	Neftaly Ortiz		
	9/4 through 9/25 (2010 quarter 3)	\$ 1,197	
	10/2 through 12/25 (2010 quarter 4)	\$ 3,576	
	1/1 through 3/26 (2011 quarter 1)	\$ 3,111	
45	<b>Total backpay</b>	\$ 7,884	
	Victor Parada		
	8/21 through 9/25 (2010 quarter 3)	\$ 1,606	\$ 1,006
	10/2 through 2/12/25 (2010 quarter 4)	\$ 3,147	\$ 1,847
	1/1 through 3/26	\$ 2,538	\$ 1,338
50	<b>Total backpay</b>	\$ 3,291	
	Juan Pletez		
	9/4 through 9/25 (2010 quarter 3)	\$ 1,198	

10/2 through 12/25 (2010 quarter 4)	\$ 3,133	
1/1 through 3/26 (2011 quarter 1)	\$ 1,346	
<b>Total backpay</b>	<b>\$ 5,677</b>	

5	David Rodriguez		
	8/21 through 9/25 (2010 quarter 3)	\$ 1,790	\$ 1,164
	10/2 through 12/25 (2010 quarter 4)	\$ 4,040	\$ 2,626
	11/1 through 3/26 (2011 quarter 1)	\$ 1,970	\$ 1,281
	<b>Total backpay</b>	<b>\$ 5,071</b>	

10	Edwin Romero		
	9/4 through 9/25 (2010 quarter 3)	\$ 1,335	
	10/2 through 12/25 (2010 quarter 4)	\$ 4,087	
	1/1 through 3/26 (2011 quarter 1)	\$ 3,307	
	<b>Total backpay</b>	<b>\$ 8,729</b>	

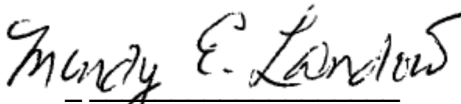
15	Santos Romero		
	9/4 through 9/25 (2010 quarter 3)	\$ 1,400	
	10/2 through 12/25 (2010 quarter 4)	\$ 4,040	
	1/1 through 3/26 (2011 quarter 1)	\$ 3,016	
	<b>Total backpay</b>	<b>\$ 8,456</b>	

20	Byron Mejia Sanchez		
	8/21 through 9/25 (2010 quarter 3)	\$ 3,850	
	10/2 through 12/25 (2010 quarter 4)	\$ 7,070	
	1/1 through 3/26 (2011 quarter 1)	\$ 4,856	
	<b>Total backpay</b>	<b>\$ 15,776</b>	

25	Encarnacion Torres		
	9/4 through 9/25 (2010 quarter 3)	\$ 1,330	
	10/2 through 12/25 (2010 quarter 4)	\$ 3,838	
	1/1 through 3/36 (2011 quarter 4)	\$ 1,872	
	<b>Total backpay</b>	<b>\$ 7,040</b>	

30	Pedro Zelaya		
	8/21 through 9/25 (2010 quarter 3)	\$ 3,662	
	10/2 through 12/25 (2010 quarter 4)	\$ 6,929	
	1/1 through 3/26 (2011 quarter 1)	\$ 6,298	
	<b>Total backpay</b>	<b>\$ 16,889</b>	

35 Dated, Washington, D.C. November 29, 2016

40   
Mindy E. Landow  
Administrative Law Judge

45

50